

Tennessee Advisory Council On Workers' Compensation

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Annual Report for
July 1, 2018 - June 30, 2019

State of Tennessee
Treasury Department
State Capitol
Nashville, Tennessee 37243-0225

David H. Lillard, Jr., State Treasurer, Chair

Larry Scroggs, Administrator

STATE OF TENNESSEE
ADVISORY COUNCIL ON WORKERS' COMPENSATION
ANNUAL REPORT
JULY 1, 2018 - JUNE 30, 2019

Pursuant to *Tennessee Code Annotated*, Section 50-6-12l (e), the Advisory Council on Workers' Compensation hereby submits its annual report for July 1, 2018 through June 30, 2019, including statistical reports and Tennessee workers' compensation data.

TABLE OF CONTENTS

Statutory Duties and Responsibilities of the Advisory Council	1
Advisory Council Members and Terms	2
Activities of the Advisory Council	5
Summary of Meetings	5
August 27, 2018	5
October 11, 2018	6
March 18, 2019	7
 Case Law Update	
Salvador Sandoval v. Mark Williamson, et al.	8
Bettye Shores v State of Tennessee	9
Katherine D. Chaney v. Team Technologies, Inc.	10
 TOSHA News	11
Conclusion	12

STATUTORY DUTIES AND RESPONSIBILITIES OF THE TENNESSEE ADVISORY COUNCIL ON WORKERS' COMPENSATION

The Advisory Council on Workers' Compensation (the "Advisory Council" or "Council") was initially created by the General Assembly in 1992. The Workers' Compensation Reform Act of 1996 terminated the then existing Council and created a new Advisory Council on Workers' Compensation. Subsequent amendments, including those in the Reform Acts of 2004 and 2013 (Chapter Numbers 282 and 289 of the Public Acts of 2013), are recorded at *Tennessee Code Annotated* ("T.C.A."), Section 50-6-121, which outlines the authority of the Council, its specific responsibilities and its general duties. The administration of the Council was transferred from the Tennessee Department of Labor and Workforce Development to the Tennessee Department of Treasury pursuant to Chapter Number 1087 of the Public Acts of 2010, and the Council's existence was extended to June 30, 2016 pursuant to Chapter Number 622 of the Public Acts of 2012. Chapter Number 608 of the Public Acts of 2016 extended the Council's existence to June 30, 2020. The Council is authorized to:

- Make recommendations to the Governor, the General Assembly, the Senate Commerce and Labor Committee, the House Consumer and Human Resources Committee, the Administrator of the Bureau of Workers' Compensation and the Commissioner of Commerce and Insurance relating to the promulgation or adoption of legislation or rules;
- Make recommendations to the Administrator of the Bureau of Workers' Compensation and the Commissioner of Commerce and Insurance regarding the method and form of statistical data collection; and
- Monitor the performance of the workers' compensation system in the implementation of legislative directives and develop evaluations, statistical reports and other information from which the General Assembly may evaluate the impact of legislative changes to workers' compensation law.

Further responsibilities of the Advisory Council are provided in T.C.A., Titles 50 and 56. These provisions, among other things, direct the Council to provide the Commissioner of Commerce and Insurance with a recommendation regarding advisory prospective loss cost filings made by the National Council on Compensation Insurance, Inc. ("NCCI"), the authorized Tennessee rating bureau.

ADVISORY COUNCIL MEMBERS AND TERMS

The current Advisory Council is composed of seven voting members, ten non-voting members and four ex-officio members. The State Treasurer is the statutory chair and a voting member for administrative purposes. Three voting members represent employers, and three voting members represent employees. The non-voting members represent local government, insurance companies, medical organizations, hospital organizations, chiropractors, physical and occupational therapists and attorneys, all in Tennessee. The chair may vote only on matters related to the administration of the Council or its research; the chair is not permitted to vote on any matter that constitutes the making of a policy recommendation to the Governor or to the General Assembly.

Appointments to the Council are made by the Governor, Speaker of the Senate and Speaker of the House pursuant to T.C.A. § 50-6-121 (a)(1)(C). They respectively appoint one employer and one employee voting member each, and the Governor appoints the additional ten non-voting Council members. The Governor may choose to appoint from lists of suggested nominees provided by interested organizations as outlined in T.C.A. § 50-6-121(a)(1)(E)(i-ii).

Effective July 1, 2018, Governor Bill Haslam re-appointed voting member Bob Pitts (representing employers) and House Speaker Beth Harwell re-appointed voting member Paul Shaffer (representing employees) to new four-year terms ending June 30, 2022. Jerry Mayo, a non-voting member representing insurance companies, resigned effective January 1, 2018, after faithfully serving as a Council member since 1996. Pam Smith, a non-voting member representing the Tennessee Hospital Association, resigned March 11, 2019. Ms. Smith had served since 2015. Both vacancies are currently being considered for appointments by Governor Bill Lee. Additionally, the terms of non-voting members Lynn Vo Lawyer (representing defense attorneys) and Jason Denton (representing employee attorneys) are scheduled to expire June 30, 2019. Governor Lee is the appointing authority for non-voting members.

One voting member, John M. Garrett (representing employees) will complete his current term on June 30, 2019. The appointing authority for his position is the Speaker of the Senate, Lieutenant Governor Randy McNally. Mr. Garrett's dedicated service as a voting member of the Council has been invaluable and is greatly appreciated.

A chart outlining the members of the Advisory Council on Workers' Compensation as of June 30, 2019 is on the following page:

MEMBERS OF THE ADVISORY COUNCIL

NAME	MEMBER TYPE	REPRESENTING
David H. Lillard, Jr. State Treasurer	Chairman Administrative Voting Member	State Treasurer Statutory Member
Kerry Dove	Voting Member	Employers
Bruce D. Fox	Voting Member	Employees
John M. Garrett	Voting Member	Employees
Brian Hunt	Voting Member	Employers
Bob Pitts	Voting Member	Employers
Paul Shaffer	Voting Member	Employees
Joy Baker	Non-Voting	Local Governments
Jerry Mayo (resigned 1/1/18)	Non-Voting	Insurance Companies
Samuel E. Murrell, III, M.D.	Non-Voting Member	Health Care Providers: TN Medical Association
Pam Smith (resigned 3/11/19)	Non-Voting Member	Health Care Providers: TN Hospital Association
Keith B. Graves, D.C.	Non-Voting Member	Health Care Providers: Licensed TN Chiropractor
John Harris	Non-Voting Member	Health Care Providers: Licensed TN Physical Therapist
Sandra Fletchall	Non-Voting Member	Health Care Providers: Licensed TN Occupational
Jason Denton	Non-Voting Member	Attorney: TN Association for Justice
Lynn Vo Lawyer	Non-Voting Member	Attorney: TN Defense Lawyers
A. Gregory Ramos	Non-Voting Member	Attorney: TN Bar Association
Senator Paul Bailey, Chairman	Ex-Officio Non-Voting	Senate Commerce and Labor Committee
Representative Clark Boyd, Chairman	Ex-Officio Non-Voting	House Consumer and Human Resources Committee
Abbie Hudgens, Administrator Troy Haley, Designee	Ex-Officio Non-Voting	TN Bureau of Workers' Compensation
Commissioner Carter Lawrence Designee, Mike R. Shinnick	Ex-Officio Non-Voting	TN Department of Commerce and Insurance

TERMS OF THE NON-EX-OFFICIO MEMBERS

Voting	Term of Position
Kerry Dove	July 1, 2016 - June 30, 2020
Bruce D. Fox	July 1, 2016 - June 30, 2020
John M. Garrett	February 27, 2015 - June 30, 2019
Bob Pitts	July 1, 2018 - June 30, 2022
Brian Hunt	October 26, 2016 - June 30, 2020
Paul Shaffer	July 1, 2018 - June 30, 2022
Non-Voting	Term of Position
Joy Baker	July 1, 2017 - June 30, 2021
Pam Smith (resigned)	July 1, 2015 - June 30, 2019
Sandra Fletchall	July 1, 2017 - June 30, 2021
Keith B. Graves	July 1, 2017 - June 30, 2021
John Harris	July 1, 2017 - June 30, 2021
Lynn Vo Lawyer	July 1, 2015 - June 30, 2019
Jerry Mayo (resigned)	July 1, 2015 - June 30, 2019
Samuel E. Murrell, III, M.D.	July 1, 2017 - June 30, 2021
A. Gregory Ramos	July 1, 2017 - June 30, 2021
Jason Denton	July 1, 2015 - June 30, 2019

ACTIVITIES OF THE ADVISORY COUNCIL

The Advisory Council is required by statute to meet at least two times per year. During the July 1, 2018 through June 30, 2019 Council year, the Advisory Council met on three occasions. Meetings were held August 27, 2018, October 11, 2018, and March 18, 2019. Approved meeting minutes may be viewed at the Advisory Council's website <https://treasury.tn.gov/Explore-Your-TN-Treasury/About-the-Treasury/Boards-and-Commissions/Advisory-Council-on-Workers-Compensation> under the "Meetings" tab. The agenda and video of each meeting are also available at the same location.

Summary of Meetings

The three Advisory Council meetings between July 1, 2018 and June 30, 2019 were devoted to receiving reports from consultants, reviewing proposed legislation and procuring information from documentation and presentations. The primary sources of pertinent information were citizens, legislators, other state officials, and representatives of business and professional entities essential to the fair, efficient and effective administration of Tennessee's workers' compensation system. A brief meeting synopsis describes the Advisory Council's activity.

Meeting on August 27, 2018

Chairman David Lillard called the meeting to order at 1:30 p.m. and welcomed Council members. After the roll was called, a physical quorum could not be established as only two voting members, **Kerry Dove** and **Bob Pitts** were present together with the Chairman. A physical quorum requires the presence of three voting members in addition to the Chairman. The Chairman explained that the meeting today would therefore be informational. The Chairman noted that the National Council on Compensation Insurance (NCCI) had today filed its prospective loss costs and rating values for the Voluntary Workers' Compensation insurance market, and rates and rating values for the Assigned Risk market, to become effective March 1, 2019. Copies of the filing have been distributed electronically to all Advisory Council members for their consideration in preparation for the next meeting of the Council.

The Chairman explained that today's agenda items, which consist of reports and overviews of workers' compensation market conditions and the filing by NCCI are pertinent to the Council's responsibility to make suitable recommendations to the Commissioner of Commerce and Insurance at the next meeting.

Council ex officio member Mike Shinnick, Workers' Compensation Manager of the Department of Commerce and Insurance ("DCI"), presented *An Overview of Tennessee Workers' Compensation Market Conditions and Environment*.

Eddie Herrera, Director of Plan Administration for the National Council of Compensation Insurance ("NCCI") presented the *Workers' Compensation Residual Market Administration Plan Report*.

Dan Cunningham, actuary of NCCI, presented an *Overview of the Voluntary Loss Cost and Assigned Risk Rate Filing* proposed to be effective March 1, 2019. **Amy Quinn** of NCCI, who was present, assisted.

The Chairman thanked each presenter and invited the Council members to review all presentations and documents in preparation for making a formal recommendation to the Commissioner of the Department of Commerce & Insurance relative to the Voluntary Loss Cost Filing at the next scheduled meeting of the Advisory Council on October 11, 2018.

Meeting on October 11, 2018

Upon convening the meeting, the **Chair, Assistant Treasurer Alison Cleaves**, informed the Council members that **Treasurer David Lillard** had a conflicting commitment and as his designee she would be chairing the meeting. The Chair noted that at the previous meeting on August 27, 2018, representatives of the National Council on Compensation Insurance (NCCI) presented an overview of the Voluntary Loss Cost and Assigned Risk Rate Filing proposed to be effective March 1, 2019. Documentation was made available to members present at the August 27, 2018 meeting, and was also distributed to members subsequent to the meeting. The Chair addressed the first item on the agenda, which was to approve the minutes of the Council's March 1, 2018 meeting. The minutes were approved on a unanimous voice vote.

The Chair addressed the next item under New Business, recognizing **David Wilstermann**, analyst for the Council. Mr. Wilstermann presented a statistical analysis of workers' compensation data compiled by the Tennessee Department of Labor and Workforce Development.

The Chair next called upon **Mary Jean King**, representing the Advisory Council's actuary, *By the Numbers Actuarial Consulting, Inc.* ("BYNAC"). Ms. King presented an actuarial review of the Tennessee Voluntary Loss Cost Filing by the National Council on Compensation Insurance ("NCCI"). Ms. King indicated the NCCI proposed decrease of -19% for the Tennessee voluntary workers' compensation insurance market had been reasonably calculated in accordance with actuarial standards of practice, considering the two-year period relied upon by NCCI in its projected decrease. Ms. King stated that BYNAC reviewed paid as well as paid+ case development and experience for policy years 2013 and 2014 in addition to the 2015 and 2016 policy years underlying the filing in order to test the assumptions of NCCI in selecting the data and development methods for its review. Ms. King said she preferred a longer experience period of four years. Using years 2013-2016, BYNAC's experience indication for the voluntary market loss cost level is -9.1%, compared to NCCI's -19%.

Council member **Bob Pitts** asked Ms. King why the difference between the NCCI recommendation and the calculation of BYNAC was so great this year. Ms. King replied that while there was agreement that there is a substantial downward trend in frequency and costs for indemnity, the difference is attributable to judgmental selection. She stated that medical cost may be starting to increase.

The Chair then recognized **Chris Burkhalter**, the actuary for the Department of Commerce and Insurance ("DC&I"). Mr. Burkhalter, representing *The Burkhalter Group* ("TBG"), also presented an analysis of the NCCI voluntary market loss cost filing. The DC&I actuary stated he had no objection to the adoption of the loss cost filing as proposed. Mr. Burkhalter noted that TBG had used a longer experience period of five years in arriving at its own overall indication of an -10.2% loss cost decrease.

The Chair then recognized Mr. **Dan Cunningham**, the *National Council on Compensation Insurance* ("NCCI") actuary, for comment and response to the actuaries' presentations relative to the Voluntary Loss Cost and Assigned Risk Rate Law-Only filing proposed to be effective March 1, 2019.

Following discussion, Council member **Pitts** moved that the Advisory Council formally notify DC&I **Commissioner Julie Mix-McPeak** that the NCCI loss cost filing proposed to be effective March 1, 2019 was viewed **favorably** by the Council, however the Council recommended a loss cost decrease factor of -14% should be adopted. Council member **Bruce Fox** seconded the motion. The voting members in attendance voted unanimously to approve the motion.

Note: On October 15, 2018, Chairman Lillard sent a letter to Commissioner McPeak informing her of the Advisory

Council's recommendation relative to the proposed increase in the assigned risk plan loss cost multiplier (LCM).

Meeting on March 18, 2019

Upon convening the meeting, **Chairman David Lillard** noted the primary purpose was for the Advisory Council to fulfill its statutory duty to consider and make recommendations on proposed legislation introduced in the First Session of the 111th General Assembly affecting the workers' compensation system. The Chair indicated two bills had been referred to the Council by **Representative Clark Boyd**, Chairman of the House Consumer and Human Resources Committee, and that the Council's recommendations would be reported to both the House Consumer and Human Resources Committee and the Senate Commerce and Labor Committee accordance with T.C.A. § 50-6-121(k).

The Chair addressed the first item on the agenda which was to approve the minutes of the Council's meeting on October 11, 2018. The minutes were approved on unanimous voice vote.

The Chair addressed the next item under New Business, which was consideration of two legislative proposals affecting the workers' compensation system.

The Chair first addressed **SB0466/HB0539 (Roberts – Howell)**, concerning a 20-factor test for determining the employment relationship. At the request of the sponsors, the proposed legislation was presented by **Justin Furrow**, attorney with the law firm of *Chambliss, Bahner & Stophel*. Mr. Furrow explained that the bill as amended (with amendment drafting code **005157**) would define the employer-employee relationship according to the 20-factor test described in Internal Revenue Service Ruling 87-41, 1987-1 C.B. 296.

Mr. **Furrow** indicated the purpose of the proposed legislation was to harmonize state law relative to the definition of the employment relationship. It would add 13 factors to the seven currently existing under T. C. A. § 50-6-102 (12) (D). Council member **Bruce Fox** asked if the bill would change the common law test of employment as expressed in Tennessee case law. Mr. **Fox** also asked if passage of the bill would result in Tennessee essentially ceding control of its definition of employment to the federal government. Mr. **Furrow** responded that case law would not be impacted but that courts could use the additional factors as guideposts in determining whether the employment relationship exists. Council members **Fox**, **Jason Denton** and **Gregg Ramos** inquired about the bill's underlying purpose, its origin, and how many states had adopted the 20-factor test. Council member **Bob Pitts** asked whether harmonization of the definitions had been accomplished at the federal level, noting he understood it had not despite a protracted attempt. Council member **Abbie Hudgens** stated the Bureau of Workers' Compensation wishes to preserve the effective work of the *Court of Workers' Compensation Claims* with the long established employment relationship definitions and that additional factors could produce unintended consequences.

After further discussion, Council member **Pitts**, seconded by Council member **Fox**, moved that the legislative proposal, in its current form, be given an **unfavorable recommendation** for passage. The motion carried **5-0**. [Note: in subsequent action by the House, the legislation was amended to leave intact the workers' compensation definitions under current law, and the amended House bill was adopted and passed by the Senate. It became **Public Chapter 237** on May 10, 2019, upon the Governor's signature.]

The Chair addressed the next item, which was **SB0271/HB0208 (Kelsey – Leatherwood)**. The bill as

amended (amendment drafting code 005890) redefines the base period for determining workers' compensation benefits for temporary total disability. It amends T. C. A. § 50-7-218. Council member **Pitts** asked if the bill as amended conflicted with federal law. Council member **Ramos** asked if the bill was needed. When asked by Council member **Fox** for the Bureau's position Council member **Hudgens** said there was uncertainty about the purpose of the bill and whether it was necessary. Following discussion, Council member **Pitts**, seconded by Council member **Fox**, moved that the bill in its current form be given a favorable recommendation for passage, *provided* that any possible conflicts with federal law are first researched and considered. The motion carried **5-0**. [Note: in subsequent legislative action, the proposed legislation was taken off notice in the Employee Affairs Subcommittee of the House Consumer & Human Resources Committee, and was assigned to the General Subcommittee of the Senate Commerce & Labor Committee.]

TENNESSEE CASE LAW UPDATE

Throughout the year, the Advisory Council followed the Tennessee Supreme Court, reviewing its decisions and suggestions regarding the need for specific changes in the law.

An annual case law update of the 2018 calendar year from the Tennessee Supreme Court, including select cases from the Tennessee Supreme Court Workers' Compensation Panel, was submitted by the Advisory Council to the General Assembly in January of 2019.

Appeals of trial court decisions in cases involving workers' compensation are referred directly to the Supreme Court's Special Workers' Compensation Appeals Panel ("Panel") for hearings. The Panel gives considerable deference to a trial court's decision with respect to credibility of witnesses since the lower court has the opportunity to observe them testify. The Panel reports its findings of fact and conclusions of law and such judgments automatically become the judgment of the full Tennessee Supreme Court 30 days thereafter, barring the grant of a motion for review. Tennessee Supreme Court Rule 51 and T.C.A. § 50-6-225(a)(1).

Three recent cases in which the Court adopted the opinions of the Panel illustrate the type of issues that are currently being considered by the Court. A brief synopsis and link to the full opinions follow:

Salvador Sandoval v. Mark Williamson, et al.

No. M2018-01148-SC-R3-WC, filed March 28, 2019

The employee, an undocumented immigrant, was hurt while working for the employer. The parties settled the claim and the employee failed to return to work at the end of the initial compensation period. The employee sought additional permanent disability benefits under T. C. A. § 50-6-207(3)(B) because he could not return to work as he was not eligible or authorized to work in the United States under Federal Immigration Law. The employee challenged the constitutionality of T. C. A. § 50-6-207 (3)(F) which does not allow for additional benefits under (3)(B) for any employee not eligible or authorized to work in the U. S. The Court of Workers' Compensation Claims held it lacked jurisdiction to determine the issue and denied the employee's request for increased benefits. The employee appealed, arguing subdivision (3)(F) is preempted by both field and conflict presumptions under the federal *Immigration Reform and Control Act of 1986* ("IRCA") (codified primarily in 8 U.S.C. §§ 1324a and 1324b). The IRCA is intended to combat employment of illegal aliens through a series of civil penalties on employers. The employee contended

that (3)(F) could not be used to deprive an undocumented worker of recourse to the increased benefits available pursuant to (3)(B) since federal law preempts the state statute. The Panel **affirmed** the decision of the trial court, and held that T. C. A. § 50-6-207(3)(B) is constitutional.

On appeal the Panel considered its earlier opinion in *Martinez v. Lawhon*, No. M2015-00635-SC-R3-WC, 2016 WL 684087 (Tenn. Workers' Comp. Panel 2016) where it found unconstitutional a prior, similar statute, T. C. A. § 50-6-241-(e)(2)(B)(ii) (2008), because of preemption by the IRCA. The statute at issue in *Martinez* restricted benefits based on immigration status and penalized employers who knowingly hired undocumented workers. The Panel determined in *Martinez* that the legislature had intended to "establish what amount[ed] to a State immigration policy." The civil penalty established in the statute was expressly prohibited by the IRCA, thus the Court ruled it was preempted.

In the present case, the Panel determined the statute under consideration does not punish employers for hiring unauthorized workers, nor does it reduce the permanent partial disability award to the employee. Thus, the Panel found no **express** preemption. It then considered whether **field** preemption applied, concluding it did not since (3)(B) regulates state law in the field of workers' compensation, traditionally a state-occupied field, and does not invade federal province in the area of immigration and naturalization where federal interest is dominant. The Panel next considered **conflict** preemption, ultimately concluding there was no conflict between the federal law, which prohibits employers from returning undocumented immigrants to work, and the state statute which is primarily designed to provide predictability for awards, so that similar impairment ratings do not produce vastly dissimilar awards. "If an employer unwittingly hires an undocumented employee, and the employee subsequently becomes injured, the employer cannot return the undocumented employee to work without violating federal law. . . (S)ection (3)(F) does not reduce the permanent partial disability award under Subdivision (3)(A). All injured employees receive the same award under this subdivision, regardless of immigration status; *however, only injured employees who are in the country legally can receive additional benefits.*"

The opinion may be accessed at

[http://www.tncourts.gov/sites/default/files/sandoval.salvador.opnjo .pdf](http://www.tncourts.gov/sites/default/files/sandoval.salvador.opnjo.pdf)

Bettye Shores v. State of Tennessee

No. M2018 -00954-SC-R3-WC, Filed February 12, 2019

The employee, a program coordinator for the Tennessee Department of Human Services, alleged she suffered a mental injury on July 1, 2016 when a reprimand from her supervisor "lit up" her preexisting post-traumatic stress disorder resulting from an automobile accident during her childhood. The employee did not give written notice of the alleged injury until November 9, 2016. The employer moved to dismiss the claim, contending the employee had failed to give timely notice of her alleged injury under T. C. A. § 50-6-201 (Supp. 2017) (Applicable to injuries occurring on or after July 1, 2016). After a hearing the Claims Commissioner granted the employer's motion to dismiss. The employee appealed, contending she had been incapable of reporting a work-related injury from August through October of 2016 because she had been hospitalized for four weeks due to suicidal ideations. The Panel **affirmed** the Commissioner's judgment.

The proof indicated the employee claimed that on July 1, 2016 her supervisor had reprimanded her, accusing her of being "untrustworthy," a "liar," and "dishonest" in connection with remarks the employee claimed she made in jest to a coworker about a promotion. The employee said the critical remarks by her supervisor reactivated her PTSD from a serious childhood automobile accident, after which she had been subjected to disparagement and mistreatment by schoolmates during her recovery. She claimed she could not recall if she finished working after the incident on July 1, 2016, and that all she could think about was suicide. She saw her doctor shortly after the incident but said she did not realize she had suffered a work injury until November 2016. The supervisor testified she only became aware of the employee's claim of a work-related injury in mid-November. Although she knew the

employee had taken Family Medical Leave in July 2016, she was unaware of the reason. Neither the leave form nor any other factor evidenced a work-related reason. The supervisor testified she had good rapport with the employee during the months between July and the point of the employee's decision to retire in December 2016.

The Panel determined it was undisputed the employee had not timely provided *written* notice. Further, the Panel concluded the employee failed to prove the employer had *actual knowledge* of the alleged injury. "To satisfy section 50-6-201, the notice must reasonably convey to the employer that the employee has suffered an injury arising out-- of and in the course-- of her employment. (Citing cases) In the absence of actual knowledge of the injury by the employer, waiver of the notice by the employer, or reasonable excuse by the employee for not giving notice, the statutory notice to the employer is an absolute prerequisite to the right of the employee to recover benefits." *Jones v. Sterling Last Corp.*, 962 S.W.2d 469, 471 (Tenn. 1998). "The employee carries the burden of proving that the requisite notice was given or excused." *Aetna Cas. & Sur. Co. v. Long*, 569 S.W.2d 448 (Tenn. 1978).

The *waiver of notice* issue, raised for the first time on appeal, was not considered since it should have been brought up at a Benefit Review Conference. The Panel also determined the employee's reliance on *reasonable excuse* was belied by her own assertions that she had immediate suicidal ideations from the incident but was unaware of an injury until causation was established by subsequent medical confirmation.

The opinion may be accessed at <http://www.tncourts.gov/sites/default/files/20190212115456.pdf>

Katherine D. Chaney v. Team Technologies, Inc.

No. E2018-00248-SC-R9-WC, Filed January 31, 2019

In March 2013 the employee collapsed at work due to a cardiac arrest, a non-work related medical condition. The employer knew of the employee's immediate need for medical assistance. The employer had acquired an automated external defibrillator (AED) but did not use it to assist the employee while awaiting emergency medical responders. The employee suffered a permanent brain injury due to oxygen deprivation. The employee filed suit for workers' compensation benefits for the injuries resulting from the employer's failure to use its AED. The employer moved to dismiss on two grounds: first, that the employee's injury was unrelated to her employment; second, that an employer has no statutory or common law duty to use an acquired AED, citing *Wallis v. Brainerd Baptist Church*, 509 S.W.3d 886 (Tenn. 2016). The employee asserted that under the emergency rule, *Vanderbilt University v. Russell*, 556 S.W.2d 230 (Tenn. 1997), the employer had a duty to provide her with medical assistance, which included using its acquired AED, and that *Wallis* did not apply since it involved a duty owed to a business invitee, not an employee. In this interlocutory appeal the Supreme Court **reversed** the trial court's denial of the employer's motion to dismiss and remanded the case for entry of an order of dismissal.

The Court revisited its opinion in *Russell*, where it held that when an employee becomes helpless at work because of illness or other cause unrelated to her employment, needs medical assistance to prevent further injury, and the employer can make such medical assistance available but does not do so, then any disability caused by the failure of the employer is considered to have "arisen out of and in the course of employment." In *Russell* the Court adopted the *emergency rule* based on the common law rule that when an employee becomes helpless by an unforeseen accident while doing his job, the "dictates of humanity, duty, and fair dealing demand that the employer if cognizant of the injury furnish medical assistance." *Id.*

"The basic premise of the *Russell* emergency rule remains good law. "Humanity, duty and fair dealing" still require an employer, if aware that an employee has been rendered helpless, to provide medical assistance. That said, courts should not apply this rule so broadly as to require employers to provide *any and all* medical assistance to a helpless employee. Instead, a reasonableness standard must be read into this rule. For that reason, we clarify and restate the *Russell* emergency rule: an injury that is caused by an

employer's failure to provide **reasonable** medical assistance arises out of and in the course of employment when an employee becomes helpless at work because of illness or other cause unrelated to her employment, the employee needs medical assistance to prevent further injury, the employer knows of the employee's helplessness, and the employer can provide **reasonable** medical assistance but does not do so." (Emphasis added).

Considering whether the employer had a duty to use the AED it had acquired, the Court noted it held in *Wallis* that a business had no common law duty to aid a patron by using an AED and that its *Wallis* analysis should also apply to an employer-employee relationship. The AED statutes (T. C. A. § 68-140-403) "do not require any entity to use an AED. *Id.* at 901. Thus, an employer has no statutory duty to use an AED to assist an employee." In the Court's opinion, mandating use of a lifesaving aid that requires special training to administer exceeds the reasonableness standard.

The Court therefore held that the employee's claim did not arise out of her employment because the employer had provided reasonable assistance (by calling for emergency personnel) and had neither a statutory or common law duty to use it AED to assist the employee.

The opinion may be accessed at
http://www.tncourts.gov/sites/default/files/chaney.katherine.opn_.pdf

Note: During calendar year 2018 the Supreme Court and its Special Workers' Compensation Appeals Panels issued opinions in 33 cases between January 4, 2018 and December 6, 2018. Twenty-five of the opinions involved "old law" cases, or those in which the work-related accidents were prior to July 1, 2014, the effective date of the *Workers' Compensation Reform Act of 2013*. Through June 10, 2019, the Special Panel has issued 6 opinions involving "old law" cases, indicating that fewer of them are working their way through the appeals process. Direct appeals to the Supreme Court should continue to decrease as more "new law" cases are resolved in the Court of Workers' Compensation Claims and the Workers' Compensation Appeals Board.

TOSHA NEWS

The Tennessee Department of Labor and Workforce Development, in cooperation with the U. S. Bureau of Labor Statistics, reported 128 work-related fatalities in Tennessee in 2017, compared to 122 in 2016, reflecting an increase of 5%. The highest number of fatal occupational injuries (39) involved workers in the major occupational groups of transportation and material moving.

According to the Bureau's 2017 non-fatal occupational injury and illness statistics, Tennessee's incidence rate was 2.9 per 100 full time workers in the *private* sector, not statistically different from the national average of 2.8. The overall recordable case incidence rate for nonfatal occupational injuries and illnesses in Tennessee for all industries, including state and local government, was 3.0. State government had the lowest incidence rate at 2.0, and local governments had the highest incidence rate, at 4.2 recordable incidents per 100 full-time equivalent workers.

In 2017, of approximately 20,010 non-fatal occupational injuries and illnesses resulting in actual days away from work, 61.3% involved male workers and 38.4% involved female workers. Approximately 24.9% of the injuries and illnesses requiring days away from work occurred to those between 45 and 54 years of age. Some 21.7% occurred to those between 25 and 34.

The Tennessee Department of Labor and Workforce Development report may be viewed at <https://www.tn.gov/content/dam/tn/workforce/documents/majorpublications/reports/2017OccupationalInjuries.pdf>

CONCLUSION

The Advisory Council on Workers' Compensation met on three (3) occasions from July 1, 2018 through June 30, 2019. This annual report provides a synopsis of the topics considered and appointments made during that time period. The Advisory Council appreciates the opportunity to be of service to the Governor, the General Assembly and Executive Departments, as well as the employers and employees of the great State of Tennessee.

Respectfully submitted on behalf of the Advisory Council on Workers' Compensation,

/s/ David H. Lillard, Jr.
David H. Lillard, Jr.
Treasurer, State of Tennessee
Chairman